Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

Diamant Boart, Inc.,

Petitioner,

v.

Joyce Martin, Individually and as
Personal Representative of the Estate
of Harry O. Martin, deceased,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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September 3, 1997

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QUESTIONS PRESENTED

1. Does the South Carolina common law, which usurps the jury's discretionary authority and requires the jury to award punitive damages if the jury finds evidence of reckless conduct, violate petitioner's Seventh Amendment right to trial by jury.

2. Does the trial court's instruction, which charged the jury to consider any statutory infraction, including an innocent or technical one, evidence of reckless conduct supporting an award of punitive damages, violate petitioner's right to due process pursuant to the Fourteenth Amendment.

PARTIES

In *Martin v. Diamant Boart America, Inc.*, which was before the Fourth Circuit as case number 96-1414, plaintiff/appellee was Joyce Martin, individually and as personal representative of the Estate of Harry O. Martin. Defendant/appellant was Diamant Boart, Inc. (f/k/a Diamant Boart America, Inc.)* Therefore, the respondent in this case is Joyce Martin, in both her individual and representative capacities. Diamant Boart, Inc., is the sole petitioner.

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*Diamant Boart America, Inc., is now known as Diamant Boart, Inc. Diamant Boart, Inc.'s parent corporations is Diamant Boart, S.A. It has no non-wholly owned subsidiaaries.

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Petition for a Writ of Certiorari to the United States Court of Appeals for Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Diamant Boart, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this proceeding entered May 30, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals in *Martin v. Diamant Boart America, Inc.* (No. 96-1414) is not reported; it is set forth in the Appendix at 1. The opinion of the United States District Court for the District of South Carolina (No. 3:92-2982-0) is also not reported; it is set forth in the Appendix at 10.

JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C § 1332 because of diversity of citizenship. On March 1, 1996, the United States District Court for the District of South Carolina rendered its final judgment. App. at 9. The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 30, 1997. App. at 1. A timely petition for rehearing was denied by an order entered on June 24, 1997. App. at 11. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment VII:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This lawsuit was brought by Joyce Martin ("Martin"), individually and as the personal representative of the estate of her deceased husband, Harry O. Martin (collectively referred to as "the Martins"), against Diamant Boart America, Inc.[1] The suit's major allegations were: that ground water on the Martin's property contained excess levels of tetrachloroethylene ("PCE") and trichloroethylene ("TCE"); that Harry Martin's death from pancreatic cancer was caused by exposure to PCE and TCE from the ground water; that DBA, which owns and operates a plant that manufactures engineered diamond products such as saw blades and drill bits near the Martin's property, was responsible for the PCE and TCE contamination; and that DBA, thus, caused damage to the Martin's property and personal injury to Mr. Martin.

DBA acknowledged that it used an acid bath in some of its processes, and that although the acid recovery system was designed as a "closed loop," under actual conditions, some acid solution was released. DBA employed workers to neutralize this acid prior to its discharge or re-use, and no acid or acid by-products were found by petitioner or anyone else on DBA's property. DBA denied that the acid bath contained either PCE or TCE; in fact, DBA denied that it used either

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[1]As noted, Diamant Boart America, Inc., is now known as Diamant Boart, Inc. However, for the sake of convenience and consistency with the lower court's opinions, petitioner shall be referred to herein as "DBA."

PCE or TCE in or near its plant. Tests conducted by both state and federal regulators found no TCE in the soil or groundwater on DBA's property; although PCE was detected, the levels were so minute that they had to be estimated.

The case was tried to a jury in the United States District Court for the District of South Carolina on claims of negligence, trespass, and nuisance. The South Carolina Department of Health and Environmental Compliance, the state regulatory body responsible for enforcing South Carolina's Pollution Control Act ("PCA"), does not believe and never alleged that DBA was the source of any contamination found in the Martin's ground water. Over DBA's objection, however, Judge Matthew J. Perry, Jr., instructed the jury that under the PCA, it is:

> unlawful for any person, directly or indirectly, to throw, drain, run, allow to seep, or otherwise discharge into the environment of the state organic or inorganic matter, including sewage, industrial wastes, and other wastes, except as in compliance with a permit issued by the department.

(Citing S.C. Code Ann. § 48-1-90). Judge Perry specifically emphasized that the PCA makes it unlawful to discharge "*any* substance."

Moreover, although Martin neither alleged nor had any claim under this South Carolina statute, the district court improperly emphasized the statute by pointedly referring to it as an important statement of public policy. For example, the court emphasized that "South Carolina, through the enactment of this and related statutes, has declared the public policy in favor of a clean environment [and] a clean water supply . . . ."

The district court also directly instructed the jury to consider a negligent or other non-reckless violation of the

PCA as evidence supporting a finding of recklessness. In particular, the district court instructed the jury that any violation of the terms of a statute such as the PCA can support the imposition of punitive damages. For example, the district court instructed:

> Now, earlier I told you, when I was talking about negligence, that the violation of a statute setting forth a certain duty and standard and policy consideration is negligence per se . . . .
>
> Now, *the violation of a statute* does not in and of itself prove recklessness, willfulness, or wantonness in and of itself, but *is evidence that the jury may consider* in arriving at its conclusion whether the defendant acted recklessly, willfully, and wantonly . . . .

(Emphasis added).

The district court gave the jury no further guidance concerning the use of a statutory violation as evidence of recklessness. In particular, the court did not instruct the jury that to consider a statutory violation as evidence of reckless conduct, the jury must also find that DBA appreciated the danger of injury to the Martins or their property at the time the statute was violated.

The district court further charged the jury that it had no discretion to refuse to award punitive damages if it found that DBA had been reckless (under the court's flawed instructions). Rather, the court instructed the jury that if it found that DBA had been "reckless," including presumably by negligent violation of the PCA, "it will be your *duty* to award punitive damages." (Emphasis added). The district did not, however, provide the jurors any instruction to assist them in determining the appropriate amount of such damages.

DBA vigorously objected to all of the court's instructions concerning the standard for determination of liability for, and of the amount of, punitive damages.

The jury returned a verdict in favor of DBA on all personal injury and negligence claims. On the trespass and nuisance claims, the jury awarded Martin a total of $31,000 in actual damages for injury to property. The jury also awarded Martin $1,000,000 in punitive damages. DBA filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, and further requested that the court reduce the excessive punitive damages award. On March 1, 1996, the district court denied DBA's motion in its entirety.

On appeal, DBA argued that the district court's instructions, among other things, violated DBA's rights under the Seventh Amendment and under the Due Process Clause of the Fourteenth Amendment. DBA also sought review and remittitur of the amount of the punitive damages award. The United States Court of Appeals for the Fourth Circuit affirmed the district court's decision on the Seventh Amendment and due process issues, and remanded DBA's motion for review and remittitur of the punitive damages award for reconsideration under the standards set forth in *Gasperini v. Center for Humanities*, ___ U.S. ___, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996).[2] App. at 7.

The Court of Appeals failed to address the Seventh Amendment issue. The Fourth Circuit agreed with the district court's finding that South Carolina "is one of the few jurisdictions" which removes all discretion from a jury and requires an award of punitive damages upon a finding of

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[2]Because the district court denied DBA's remittitur motion before this Court issued its ruling in *Gasperini*, the district court did not apply South Carolina law to determine whether the verdict was excessive.

"reckless" conduct. App. at 6 Because the Court of Appeals concluded any error was harmless, it did not address the impact this instruction on DBA's right to a jury trial. App. at 6.

Similarly, the Court of Appeals failed to address the district court's erroneous equation of a violation of the PCA with willful, wanton, or reckless conduct. Nor did the Fourth Circuit discuss the impact of these instructions on DBA's due process rights. App. at 7.

A petition for rehearing was denied by an order entered June 24, 1997. App. at 11.

REASONS FOR GRANTING THE WRIT

I. The unique South Carolina common law which usurps the jury's discretionary authority and requires it to award punitive damages is a fundamental attack on rights preserved by the Seventh Amendment and deprived DBA of its right to a trial by jury.

The Fourth Circuit conceded that South Carolina "is one of the few jurisdictions" that removes all discretion from a jury and requires an award of punitive damages upon a finding of "reckless" conduct. App. at 7. (In fact, petitioner is aware of no state or jurisdiction other than South Carolina that similarly has removed the decision whether to award punitive damages from the jury.) The Fourth Circuit failed to directly address petitioner's argument that the South Carolina rule violates the Seventh Amendment right to a trial by jury, and its affirmance of the district court's judgment is inconsistent with the terms and requirements of the Seventh Amendment. This issue presents an important issue of federal constitutional law that must be settled by this Court.

The Seventh Amendment, a cornerstone of the Bill of

Rights, governs proceedings in federal courts and guarantees the right to a jury trial. *Gasperini*, ___ U.S. ___, 116 S. Ct. 2211, 135 L. Ed. 2d at 668. This Court long has emphasized that any curtailment of that right should be "scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1934).

In federal courts, the Seventh Amendment mandates that federal law governs the allocation of issues between a judge and jury.[3] *Gasperini*, ___ U.S. ___, 116 S. Ct. 2211, 135 L. Ed. 2d at 677; *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525 (1958); *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1125 (5th Cir. 1978). When federal rules entitle litigants to a jury determination of an issue, a federal court may not yield to a contrary state practice. *Byrd*, 356 U.S. at 538; *Nunez*, 572 F.2d at 1125

To determine the scope of the Seventh Amendment, this Court has stressed the importance of examining common law principles governing the role of the jury. *See, e.g., Dimick*, 293 U.S. at 487. Thus, in *Tull v. United States*, 481 U.S. 412 (1987), the Court recognized that the appropriate allocation of issues between judge and jury is based upon the common law. *Id.* at 417. The Court long has emphasized that, under the Seventh Amendment, federal courts should be reluctant to stray from traditional common law standards. *Browning-Ferris v. Kelco Disposal*, 492 U.S. 257, 280 n.26 (1989).

There can be no clearer mandate from the common law than this principle of law: it is the province of the jury to decide *whether* to award punitive damages. *See*

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[3]The allocation between the judge and jury of fact finding responsibility is a procedural matter. *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1416 (4th Cir. 1992). A state court assessing punitive damages may apportion fact finding responsibility between the judge and jury. *Id.* However, when the same issue is presented in federal court, federal law controls. *Id.*

RESTATEMENT 2D TORTS § 908 comment d ("Whether to award punitive damages and the determination of the amount are within the sound discretion of the trier of fact, whether judge or jury."); *Gagne v. Town of Enfield*, 734 F.2d 902 (2nd Cir. 1984) ("Whether punitive damages are to be awarded and in what amount is for the trier of fact . . . ."); DOBBS, THE LAW OF REMEDIES DAMAGES - EQUITY - RESTITUTION § 3.9 (1973) ("Punitive damages are not given as of right in any state . . . . If the plaintiff proves sufficiently serious misconduct on the defendant's part, the question whether to award punitive damages is left to the jury which may or may not make such an award.").[4]

This Court's prior decisions concerning the role of the jury under the common law are in accord. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 24-25 (1991) (Scalia, J., concurring) (traditional practice of "American courts [is] to leave punitive damages . . . to the discretion of the jury."); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 370 (1852) (whether to award punitive damages, and the amount of such damages, "has always been left to the discretion of the jury"). Indeed, in *Smith v. Wade*, 461 U.S. 30 (1989), the Court stated that punitive damages "are never awarded as a matter of right, no matter how egregious the defendant's conduct." If the plaintiff proves sufficiently serious misconduct on the part of the defendant, the question is then put to the jury whether to award punitive damages. *Id.* at 52.

Not surprisingly, this Court expressly has acknowledged that, under the Seventh Amendment, the question of whether to award punitive damages is a legal claim

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[4]As late as 1891, the common law of South Carolina similarly provided that the jury had the discretion whether to impose punitive damages upon a finding of recklessness. *Duckett v. Pool*, 13 S.E. 542 (S.C. 1891 ("where the testimony satisfies the jury that the defendant acted maliciously, willfully, or in a wanton disregard of the rights of the plaintiffs, the jury *may* . . . [award punitive or exemplary damages].") (emphasis added).

that must be decided by the jury. *Tull*, 481 U.S. at 422 (citing *Curtis v. Loether*, 415 U.S. 189, 197 (1974)). Thus, in *Tull*, the Court held that it is for the jury to determine liability for civil penalties. *Id.* at 427. In so holding, the Court specifically stressed that this rule must be followed to "preserve the substance of the common-law right of trial by jury." *Id.* at 426 (citing *Colgrove v. Battin*, 413 U.S. 149, 157 (1973)).

The present South Carolina law in question, thus, violates the Seventh Amendment. By requiring the trial court to direct the jury to award punitive damages if recklessness is established, the South Carolina rule usurps the traditional common law and federal rule that such a determination exclusively is in the province of the jury. In short, the South Carolina rule represents a gross departure from the common law and the express holdings of this Court concerning the standards imposed by the Seventh Amendment.

The Fourth Circuit viewed this breach of the Seventh Amendment as, at most, a "harmless" instructional error. That view blatantly eviscerates the requirements of the Seventh Amendment. It certainly does not comply with this Court's admonition that any abridgement of the right to a trial by jury must be "scrutinized with the utmost care." *Dimick*, 293 U.S. at 486. Nor is it consistent with this Court's holdings that if federal rules entitle a litigant to a jury determination of any issue, a federal court may not submit to a contrary state practice. *Byrd*, 356 U.S. at 538.[5]

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[5]The Fourth Circuit suggested that the instruction requiring the jury to award punitive damages was harmless because "[i]t is difficult to imagine that setting the minimum amount of damages at zero dollars instead of one dollar would have affected the final verdict in the slightest." App. at 7. Even if deprivations of constitutional rights could ever be justified based on such speculation, the Fourth Circuit's statement ignores several important factors. First, as Justice O'Connor noted in *Haslip*, 499 U.S. at 43, "[m]ultimillion dollar losses are inflicted on a whim." (O'Connor, J., dissenting). Second, because the jury was instructed that it was required to award punitive damages if it found that DBA had been reckless, the jury lacked the discretion to chose to award nothing. Under these

Petitioner can point to no conflict in the law of the various circuits on this issue precisely because no state other than South Carolina has attempted to deprive citizens of the right to a jury determination on the issue of whether punitive damages should be awarded. That fact, however, does not diminish the importance of the issue to petitioner and every other defendant in a federal civil trial applying South Carolina law. Because the Fourth Circuit has demonstrated that it will not enforce the right of defendants to a jury trial on this issue, petitioner (and other defendants in the future) must rely on the supervisory power of this Court to enforce the fundamental Seventh Amendment right to a trial by jury.

II. By permitting the jury to consider any statutory violation, including an innocent or technical infraction, as evidence supporting an award of punitive damages, the district court's instructions offend the minimum culpability requirements imposed by the Due Process Clause of the Fourteenth Amendment.

DBA's rights under the Due Process Clause of the Fourteenth Amendment were violated by the district court's instructions to the jury, which virtually compelled the jury to award punitive damages without the necessary finding of willful or reckless conduct. Although the district court's instructions nominally included the direction that punitive damages should not be imposed absent a finding of recklessness, the court's instructions permitted the jury to equate "reckless" conduct with a violation of the PCA, even if DBA's violation of that statue was innocent or merely negligent. The court then *required* the jury to award punitive damages against DBA if it found that DBA was "reckless"

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circumstances, the manner in which the duty to award damages impacted the amount of the award can never be determined.

under its flawed definition. Those instructions dramatically deviated from the procedural and substantive safeguards of the common law and permitted, if they did not require, the arbitrary imposition of punitive damages against DBA without fair or reasonable warning.[6]

This Court has emphasized that "[a] decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434-35 (1994). That clause prohibits the arbitrary, lawless, or biased imposition of civil penalties or punitive damages. *See, e.g., id.* at 120; and *Southwestern Telegraph & Telephone Company v. Danaher*, 238 U.S. 482 (1915).

Arguably the most fundamental common law safeguard against an arbitrary, lawless, or biased award of punitive damages is the requirement that punitive damages only be awarded for willful, intentional, or reckless conduct; mere negligent conduct is not sufficient or relevant. *See, e.g., Woodworth*, 54 U.S. (13 How.) at 370 (common law requires showing of malice, wantonness, or oppression to justify award of punitive damages); *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, C.J., dissenting) (punitive damages are quasi-criminal in nature); Restatement 2d Torts § 908 comment b ("Punitive damages are not awarded for mere inadvertence,

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[6]In the past several years, this Court has addressed several significant issues relating to the appropriate constitutional standards for, and limitations on, the award of punitive damages. *See, e.g., Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (due process requires judicial review of the size of punitive damages award); *TXO Productions v. Alliance Resources*, 509 U.S. 443 (1993)(discussing due process limits on size of punitive damages awards); *Haslip*, 499 U.S. 1 (analyzing constitutional status of punitive damages). It has not, however, squarely addressed the limits imposed by the Due Process Clause on the requisite conduct necessary to support an award of punitive damages. This case provides the Court an important opportunity to decide that issue.

mistake, errors of judgment and the like, which constitute ordinary negligence"); *Pickens v. South Carolina & G.R. Co.*, 32 S.E. 567, 570 (S.C. 1899) ("Willfulness is the foundation of a recovery for exemplary damages, and such damages are not recoverable unless the wrongful act was willful or intentional.").

As early as the decision in *Southwestern Telegraph*, 238 U.S. 482, this Court recognized the necessary relationship between the Due Process Clause and the requirement that punitive damages or other civil penalties be imposed only upon a finding of genuinely culpable conduct. In holding that a civil penalty violated the Due Process Clause, the Court stated:

> [T]he question remains whether, in the circumstances, penalties aggregating $6,300 could be imposed without departing from the fundamental principles of justice embraced in the recognized conception of due process of law. In our opinion the question must be answered in the negative. *There was no intentional wrongdoing, no departure from any prescribed or known standard of action, and no reckless conduct . . .* . In these circumstances to inflict upon the company penalties aggregating $6,300 was so *plainly arbitrary and oppressive* as to be nothing short of a taking of its property *without due process of law.*

Id. at 490 (emphasis added).

Similarly, in *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 116 S. Ct. 1589 (1996), the Court reaffirmed that, to justify the imposition of punitive damages, the Due Process Clause requires a showing of genuinely reprehensible conduct. In addressing an award of punitive damages that the Court held violated the defendant's substantive due process rights, the Court stated:

> Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect "the enormity of his offense . . . . " (citing *Day v. Woodworth*, 13 how. 363, 371 (1852). This principle reflects the accepted view that some wrongs are more blameworthy than others.

___ U.S. at ___, 116 S. Ct. at 1599.

In addition, the Due Process Clause embodies several procedural safeguards. In determining whether procedural due process rights have been afforded, this Court consistently has adhered to the rule that "traditional practice provides a touchstone for constitutional analysis." *Honda Motor*, 512 U.S. at 430. Thus, in *Honda Motor*, the Court held that in the context of punitive damages the due process analysis should focus upon a state's departure from traditional procedures. *Id.* at 421 (discussing *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), and *TXO Productions v. Alliance Resources*, 509 U.S. 443 (1993)). If the procedure employed by the trial court deviates from well established common law procedural safeguards, there is a presumption that the Due Process Clause has been violated. *Honda Motor*, 512 U.S. at 430.

One of the fundamental procedural safeguards is the role played by proper jury instruction. *Id.* at 433. Proper instruction of the jury is necessary to protect against arbitrary, lawless, or biased punitive damages verdicts. *Id.*

The district court's jury instructions in this case met neither the substantive nor procedural requirements of the Due Process Clause. Contrary to the requirements of that clause, the district court directly instructed the jury that it could use

evidence of a violation of the PCA to support a finding of recklessness, even in the absence of any evidence that DBA's violation of that statute was grossly negligent, willful, wanton, or otherwise genuinely reprehensible. In particular, the district court charged the jury:

> Now, earlier I told you, when I was talking about negligence, that the violation of a statute setting forth a certain duty and standard and policy consideration is negligence per se . . . .

The court then immediately instructed the jury that *any* violation of the terms of a statute, regardless of the defendant's mental state, can support a finding of reckless conduct:

> Now, *the violation of a statute* does not in and of itself prove recklessness, willfulness, or wantonness in and of itself, but *is evidence that the jury may consider* in arriving at its conclusion whether the defendant acted recklessly, willfully, and wantonly . . . .

(Emphasis added). Perhaps most significantly, and contrary to South Carolina law, the court failed to instruct the jury that a violation of a statute such as the PCA *cannot* support a finding of recklessness *unless* the jury concluded that DBA "appreciated the likelihood of harm to the [petitioner] and acted with indifference to the requirements of the regulation." *Ravan v. Greenville County*, 434 S.E.2d 296, 303 (S.C. App. 1993).

These instructions fall far short of the minimum requirements imposed by the Due Process Clause. Rather than requiring a jury to find award punitive damages based on reckless or wanton conduct, as constitutionally required, the instructions affirmatively invited the jury to find DBA liable for punitive damages based on a negligent or other non-

reckless violation of the PCA. Indeed, because the district court failed to instruct the jury that a violation of the PCA cannot equate with reckless conduct and support punitive damages unless the petitioner also proved that DBA knew that its conduct posed a substantial danger to the Martins, the instructions allowed the jury to consider a violation of the PCA as substantial evidence of recklessness, *even if the jury affirmatively believed that DBA was not indifferent to the terms of the statute or was not aware that the violation of the statute posed any danger to the Martins*.

It is extremely significant in this regard that the jury's verdict that DBA was liable for trespass does not establish that the jury believed that DBA had acted willfully or wantonly. As the district court properly instructed the jury, under South Carolina law, a defendant may be liable for trespass even if it acted "innocently," so long as it "intended" to perform some act that resulted in a trespass; there is no requirement that the defendant know of, appreciate, or intend to commit the trespass, or even that any injury result.

In short, the district court's instructions violated DBA's due process rights by instructing the jury to consider evidence of non-reckless conduct to support a finding of recklessness. Even if the jury was convinced that DBA "innocently" or "technically" violated the PCA, the jury was instructed to consider the PCA violation as substantial evidence DBA had acted recklessly, and, then, if "reckless" conduct (*i.e.*, technical statutory violation) was present, it was required to award punitive damages. By so instructing the jury, the district court fundamentally departed from the requirements of the Due Process Clause and this Court's precedents. Accordingly, this case presents a significant opportunity for the Court to clarify and firmly establish the constitutional limits imposed by the Due Process Clause on the minimum conduct necessary to support an award of punitive damages.

CONCLUSION

The South Carolina common law rule that requires the jury to award punitive damages in all cases in which any "reckless" conduct is found impermissibly nullifies the jury's discretionary authority to decide whether to award punitive damages. This radical departure from the role traditionally accorded the jury under the common law violated petitioner's Seventh Amendment guarantee of a trial by jury. Moreover, by instructing the jury to award punitive damages based on conduct that potentially was neither willful, wanton, or reckless, the district court's instructions diluted fundamental common law safeguards against the arbitrary and lawless award of punitive damages. This Court's guidance is, thus, necessary to clarify and emphasize the minimum conduct required to support an award of punitive damages consistent with due process of law. Accordingly, the Court should grant this petition for certiorari.

Respectfully submitted,

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September 3, 1997

APPENDIX

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1414

JOYCE MARTIN, Individually and as
personal representative of the
Estate of Harry O. Martin, deceased,
Plaintiff-Appellee,

v.

DIAMANT BOART AMERICA, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the District of South Carolina, at Columbia.
Matthew J. Perry, Jr., Senior District Judge.

Argued: May 6, 1997 Decided: September 17, 1997

Before WILKINSON, Chief Judge, WILKINS, Circuit Judge,

and TRAXLER, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed in part and remanded in part by unpublished per curiam opinion.

ARGUED: Timothy William Bouch, Young, Clement, Rivers & Tisdale, L.L.P., for Appellant. James Marcus Whitlark, Fedor, Massey, Whitlark & Ballou, Columbia, South Carolina, for Appellee. ON BRIEF.- Stephen P. Groves, W. Jefferson Leath, Stephen L. Brown, Young, Clement, Rivers & Tisdale, L.L.P., Charleston, South Carolina; Mary L Barrier, Morrison & Hecker, Kansas City, Missouri, for Appellant David A. Fedor, Paul C. Ballou, Fedor, Massey, Whitlark & Ballou, Columbia, South Carolina; James B. Richardson, Jr., Svalina, Richardson & Larson, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Harry and Joyce Martin sued Diamant Boart America ("DBA') claiming that DBA had illegally dumped hazardous chemicals, contaminating the Martins' property. The case was tried before a jury, which awarded $31,000 in damages for trespass and $1,000,000 in punitive damages. DBA appeals, arguing that there was insufficient factual support for the verdict, that the jury was improperly instructed as to punitive

damages, and that the district court failed to review DBA's motion for remittitur according to South Carolina law as required by *Gasperini v. Center for Humanities*, 116 S. Ct. 2211 (1996). We find that the jury's verdict was supported by the evidence. We therefore affirm the district court on the issue of liability. The punitive damages instructions also comported with South Carolina law. However, we remand the issue of remittitur for reconsideration in light of *Gasperini*.

I.

DBA operates a plant in Richland County, South Carolina, which manufactures engineered diamond products such as saw blades, drill bits, and grinding wheels. Hazardous chemicals used as degreasers are left over from the production process.

In 1990, Harry and Joyce Martin, who lived around 400 feet from DBA's property, discovered that their well was contaminated with trichloroethylene ("TCE"), tetrachloroethylene ("PCE"), and other hazardous chemicals. Other wells in the area were also contaminated. The South Carolina Department of Health and Environmental Control advised the Martins and others to cease using their wells for drinking, bathing, or cooking.

In early 1992, Harry Martin was diagnosed as suffering from pancreatic cancer. Prior to his death in October 1992, Harry Martin and his wife filed suit against DBA claiming personal injury and property damage. At trial, DBA denied using TCE at its plant. Martin countered this contention with testimony from a salesman who had sold TCE to DBA and with testimony from ex-DBA employees that DBA had both used and improperly dumped large amounts of hazardous chemicals.

DBA responded to this evidence with studies which

concluded that DBA was not the source of the contamination of the Martins' property. Indeed, there was conflicting evidence as to whether TCE was even detected in significant quantities in the samples taken from DBA's property and samples taken from the property between DBA and the Martins' property. Martin explained the low level of contamination on DBA's land with expert testimony that the contaminants had "migrated" from DBA's property over time, and that the low levels of contaminants resulted from recent changes in DBA's waste disposal measures.

Following a three-week trial in September and October of 1995, the jury found for DBA on all personal injury and negligence claims, but awarded Joyce Martin $31,000 for nuisance and trespass and punitive damages of $1,000,000. The district court denied DBA's motion for judgment as a matter of law and DBA's motion for a new trial or remittitur. DBA appeals.

II.

As an initial matter, DBA contends that there was insufficient evidence to support the trespass verdict. It primarily argues that the testimony of Dr. Jack Parker, Martin's expert witness, was shown to have no factual underpinning and that it should not have been admitted under *Daubert v. Merrell-Dow Pharmaceutical, Inc.*, 113 S. Ct. 2786 (1993). DBA argues that Dr. Parker's testimony was fatally flawed because his theory of how contaminants had migrated to the Martins' property from DBA was contradicted by the evidence. For example, DBA maintains that at most there were low levels of TCE on its own property and the property between the DBA plant and the Martins' property. Thus, it concludes that the DBA plant could not have been the source of TCE and PCE contamination.

However, for every contention raised by DBA, Martin

was able to offer a reasonable explanation or provide evidence to the contrary. First, Martin proffered evidence which showed that TCE and PCE were indeed found in DBA's groundwater. She further explained the absence of hazardous chemicals in the samples taken from the intervening property by noting that those wells were shallow, and that the chemicals TCE and PCE are "sinkers" which tend to migrate to the lowest point of the aquifer.

While the facts presented by DBA certainly could have done much to undermine the weight of Dr. Parker's. testimony, his basic theory of how chemicals migrated to the Martins' property was not inadmissible. Indeed, his "mounding" theory of migration appears to have some acceptance in the field of hydrogeology. In fact, it was initially developed in the 1950s by one of DBA's own expert witnesses. We therefore conclude that the trial court did not abuse its discretion by allowing Dr. Parker's testimony into evidence. *United States v. Dorsey,* 45 F.3d 809, 814 (4th Cir. 1995) (decision to admit or exclude expert testimony under *Daubert* reviewed for abuse of discretion).

DBA also contends that the testimony of former DBA employees as to DBA's dumping of chemical waste should have been excluded as evidence of past acts under Fed. R. Evid. 404(b). This contention is meritless. The testimony of the former employees was not, as DBA alleges, evidence of past acts designed to show that DBA was "once a polluter, always a polluter." Rather the testimony was necessary to establish that DBA had dumped large quantities of the hazardous chemicals in question and was indeed the source of the contaminants found on the Martins' property.

As to DBA's other arguments regarding the factual support of the jury's verdict, suffice it to say that our review of the record reveals no dearth of evidence to support a verdict for either party. Both parties were able to present their case to

the jury, and it was for the jury as fact finder to assess the complex evidence and reach a verdict. While reasonable minds may have come to a different conclusion than the one the jury ultimately reached, we cannot say that no reasonable juror could have returned a verdict for Martin. *Brinkly-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 351 (4th Cir. 1994). Therefore, we affirm as to DBA's liability.

III.

Next, DBA complains that the jury instruction as to punitive damages was flawed, and therefore the jury's verdict on this issue must be reversed. We disagree. While the instructions in this case were extensive, the fundamental prerequisite for punitive damages was properly set forth by the district court. The court instructed the jury that they should award punitive damages only if DBA had acted recklessly, willfully, or wantonly. This comports with the threshold standard for an award of punitive damages under South Carolina law. *See Wise v. Broadway,* 433 S.E.2d 857, 859 (S.C. 1993).

DBA further complains that the instruction was erroneous because it stated that a finding of a willful, wanton, and reckless violation required an award of punitive damages in some amount South Carolina, however, is one of the few jurisdictions where the instruction is correct. *See Sample v. Gulf Oil Refinery,* 191 S.E. 209, 214 (S.C. 1937); *see also Campus Sweater and Sportswear Co. v. M. B. Kahn Construction,* 515 F.Supp. 64, 104 (D.S.C. 1979) (following *Sample*). In any event, even if there had been error in this instruction it was surely harmless. The jury in the case was free to award punitive damages in an amount far less than one million dollars. It is difficult to imagine that setting the minimum amount of damages at zero dollars instead of one dollar would have affected the final verdict in the slightest.

IV.

Finally, we turn to DBA's contention that the district court improperly denied its motion for a new trial or remittitur. In *Gasperini v. Center for Humanities,* the Supreme Court clearly instructed that a district court sitting in diversity must apply state law standards to determine whether a verdict is excessive. 116 S. Ct. at 2224-25. The district court in this case denied DBA's motion before *Gasperini* was decided, and consequently did not provide an opinion indicating whether or how it followed South Carolina law when it made its ruling. Because of its greater intimacy with the case, the trial court is in a preferable position to determine the propriety of damages. Id. at 2225; *see also Steinke v. Beach Bungee, Inc.,* 105 F.3d 192, 198 (4th Cir. 1997). We therefore remand this case so that the district court may apply the standards set forth in South Carolina law.

The leading South Carolina case on determining whether punitive damages are excessive is *Gamble v. Stevenson,* 406 S.E.2d 350 (S.C. 1991). In that case, the South Carolina Supreme Court set out eight factors to consider:

> (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness of concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally (8) . . . other factors deemed appropriate.

Id. at 354.

On remand, the district court should apply these factors and should "look to South Carolina cases to determine the range of damages in cases analogous to the one at hand."

Steinke, 105 F.3d at 198. A reasoned decision by the district court following this approach will "reduce the risk of caprice in large jury awards and will assure a reviewing court that the trial court exercised its considered discretion under the applicable state law." Id.[1] [2]

V.

We affirm the judgment of the district court as to the issue of DBA's liability. We remand the issue of punitive damages to the district court for consideration of appellants' motion for remittitur under South Carolina law.

AFFIRMED IN PART, REMANDED IN PART

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[1] In light of the remand on the punitive damages issue. We need not reach DBA's contention that the jury's verdict exceeded the constitutional standards set forth in *BMW of North America, Inc. v. Gore,* 116 S. Ct. 1595 (1996).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

JOYCE MARTIN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HARRY O. MARTIN, DECEASED	)	CIVIL ACTION NO.3:92-2982-0
Plaintiffs, v.	)	
DIAMANT BOART AMERICA, INC.	)	ORDER
Defendant.	)	

This matter is before the Court pursuant to the defendant's Motions for judgment as a matter of law or in the alternative, for a new trial (remittitur or absolute) as to the jury findings on nuisance and trespass, for a stay in enforcement of judgment, and for relief from judgment., Also pending before the Court is the Plaintiffs' motion for costs and the Defendant's bill of costs.[1] These matters were argued before the Court on January 10, 1996 and taken under advisement.[2]

Accordingly, upon consideration of the arguments of counsel and the memoranda submitted the Court is of the opinion that the defendant's motions should be and are hereby

[1]The plaintiff filed a motion for costs with an attached exhibit setting forth the costs sought. The plaintiff is directed to refer to Local Rule 28.00 (D.S.C.) for the proper method of submitting costs to the Court.

[2]At the hearing the Plaintiff agreed to submit an agreed upon bill of costs to the Court.

denied. The revised costs submitted to the Court by the plaintiff by letter dated February 28, 1996 is hereby approved.[3]

IT IS SO ORDERED.

MATTHEW J. PERRY
SENIOR UNITED STATES
DISTRICT JUDGE

Columbia, South Carolina,

March 1, 1996.

[3]The plaintiff is directed to file an amended bill of costs with the Clerk of Court reflecting the agreed upon costs of $1,085.85.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1414

JOYCE MARTIN, Individually and as
personal representative of the
Estate of Harry O. Martin, deceased,
Plaintiff-Appellee,

v.

DIAMANT BOART AMERICA, INC.,
Defendant-Appellant.

On Petition for Rehearing
with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

_____
CLERK

(2)

Supreme Court, U.S.
FILED
OCT 10 1997
CLERK

No. 97-413

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

Diamant Boart, Inc.,

Petitioner,

v.

Joyce Martin, Individually and as Personal Representative of the Estate of Harry O. Martin, Deceased,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Diamant Boart America, Inc. ("DBA") opened its plant in the Columbia, South Carolina suburbs in 1977. The plant was not connected to a sewer system. The early plans for the plant's design called for the construction of various filters and recycling systems to treat the plant's wastewater discharge, which would contain volatile organic compounds ("VOC's") and other hazardous waste. (The plant's industrial processes required the use of large quantities of "degreasers," solvents, and other chemicals. These included several VOC's well known to be hazardous to human health, including trichloroethylene (TCE), tetrachloroethylene (PCE), and dichloroethylene (DCE).) As built, however, the plant included no such treatment devices. Instead of disposing of its waste offsite, DBA simply dumped its effluent onto the ground in back of the plant and into the underground septic field on the property for fourteen years after the plant opened. These discharges ranged from 5,000 gallons, the volume contained in a holding tank at the back of the plant, to 55-gallon drums full of various chemicals brought by employees from locations all over the plant, all the way down to 5-gallon buckets poured out the back door. On an average day, DBA discharged about 12,000 gallons of contact wastewater and 13,000 gallons of non-contact cooling water directly to the ground. The total amount of contaminated wastewater discharged by DBA over the fourteen-year period exceeded 100,000,000 gallons. DBA had no permit to discharge any of these wastes prior to 1989. DBA's 14-year practice of dumping without a permit was in violation of South Carolina's Pollution Control Act, S.C. Code Ann. §§ 48-1-90, *et seq.* (1987).

DBA had one of its contact wastewater streams tested by an independent laboratory in 1982 and again in 1986. In 1982 the stream was found to contain hazardous waste concentrations above regulatory maximum levels. Both tests showed that DBA was dumping contaminated wastewater, even though DBA denied such knowledge at trial.

In 1987, after dumping wastewater illegally for ten years, DBA commissioned an environmental audit by an outside consultant, Norman Parker. In the course of his audit Mr. Parker observed blatant violations of the South Carolina Pollution Control Act. He witnessed discharges of hazardous wastes such as TCE directly to the wastewater stream and to the ground. Mr. Parker reported to DBA management that the plant had a history of spills of TCE, a source of potentially significant soil and groundwater contamination. He warned DBA management of the risks of groundwater contamination and the need to go to a "zero discharge" system. He advised DBA that a "zero discharge system" was technologically feasible. He warned that TCE and other solvents will quickly migrate with resultant groundwater contamination of the underlying aquifer. Mr. Parker observed that a major problem was what he perceived to be a lack of upper management support for the safe disposition of hazardous waste. Mr. Parker concluded his environmental audit by expressing his opinion that DBA's dumping of wastewater posed a serious risk of groundwater contamination which required correction in an urgent manner. DBA continued its illegal discharges until September 1989.

In 1983 DBA falsely represented to the South Carolina Department of Health and Environmental Control (DHEC) that DBA did not handle hazardous waste in any way in 1981 or 1982. DBA's senior management admitted at trial that hazardous waste, including waste degreasers, were continuously present on DBA's premises from 1977, and admitted that DBA had intentionally falsified the report to DHEC.

In 1982 DHEC wrote to DBA asking whether it was discharging any effluent. DBA did not reply. DHEC failed to follow up. In early 1986, DHEC repeated its question. Again DBA failed to respond, and again the agency failed to follow up. The same thing happened a third time in late 1986. DBA did not respond to DHEC inquiries until September 1989. DBA offered no explanation for its failure to respond to the agency's repeated inquiries. When DHEC finally investigated, DBA agreed to a

consent order forbidding it to dump any contact cooling water, and reducing the discharge of noncontact cooling water from about 13,000 gallons daily on average to a maximum of 500 gallons daily. The dumping of VOC's was prohibited altogether.

In 1990 the Martins, who lived about 360 feet from DBA's property, discovered that their well water was contaminated with TCE, PCE and other hazardous chemicals. The Martins had been drinking this water for years. Similar findings were made with thirty other drinking water wells in Royal Pines subdivision. DHEC advised the Martins and others to cease using their wells for drinking, bathing, or cooking. Six of these wells were within a quarter mile of DBA's plant, including the Martins' well and that of a child care facility.

"Mounding" is an accepted explanation in the hydrological community for subterranean migration. Plaintiff's hydrogeologist, Jack Parker, testified that mounding accounted for the migration of DBA's pollution to the Martins' property. He opined that mounding caused by these massive wastewater discharges resulted in a shift in the regional underground water flow and channeled DBA's hazardous wastes to the Martins' well and beyond. Dr. Parker ruled out all other possible sources of the Martin pollutants by applying hydrological principles to all relevant data, including DHEC's investigation. He testified that there was no doubt that DBA was the source of the contamination of the Martins' property and in Royal Pines generally.

DBA's hydrogeologist, Bryson Trexler, agreed that mounding can radically alter the direction of groundwater flow. Dr. Trexler conceded that it was probable that mounding caused DBA's polluted groundwater to reach the Martins' well as Dr. Parker believed, if Dr. Parker's underlying data concerning the rate of illegal wastewater discharge were correct. The data were unchallenged. PCE, DCE, and methylene chloride were all detected in DBA's groundwater and in the Martins' groundwater. TCE was detected in the Martins' groundwater and in samples of DBA's

groundwater. DBA's expert, Dr. Todd, acknowledged that TCE was present in DBA's groundwater. The fact that only low concentrations of these toxins are now present in DBA groundwater was explained by Dr. Trexler. These pollutants tend to migrate. The longer the time since discharge, the lower the concentration at the point of discharge. Dr. Trexler acknowledged that the bulk of these chemicals would have been flushed away from DBA property over time, leaving only the low concentrations on DBA property found by Dr. Trexler. Plaintiff's hydrologist Dr. Parker agreed. Present concentrations of PCE, TCE, and DCE in DBA's groundwater fit the profile expected by Dr. Parker and by Dr. Trexler.

There is no evidence to suggest that the pollution plume which contaminated the Martins' property and the other property in Royal Pines originated anywhere but at DBA. DBA is the source of the contaminant plume in Royal Pines subdivision and on the Martins' property.

At trial DBA denied ever purchasing barrels of TCE despite the testimony of the chemical company salesman and several plant employees. During Norman Parker's 1987 environmental audit of DBA, he also discovered TCE drums at the plant. DBA denied ever having open waste streams with solvents, oils, and metals in them. DBA denied that employees regularly dumped chemicals onto the ground, out the back door, or into the open waste streams.

* * * *

The petition for writ of certiorari contains several inaccurate statements. DBA states that "[t]he district court did not *** provide the jurors any instruction to assist them in determining the appropriate amount of [punitive] damages." (Petition at 5.) On the contrary, the district court charged the jury at length upon the standards governing the assessment of punitive damages, as prescribed in *Gamble v. Stevenson,* 305 S.C. 104, 406 S.E.2d 350 (1991), and in *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th

Cir. 1991) .

DBA states (Petition at 6): "On appeal, DBA argued that the district court's instructions *** violated DBA's rights under the Seventh Amendment and under the due process clause of the Fourteenth Amendment." No such issues were raised on appeal. Not until its petition for rehearing in the Court of Appeals did DBA first contend that it was denied due process by South Carolina's rule that punitive damages in *some* amount must accompany a finding that plaintiff's rights were willfully violated.

DBA states (Petition at 7) that the Court of Appeals "did not address the impact [of] this instruction [*i.e.*, that punitive damages in *some* amount must be assessed for a willful violation of plaintiff's rights] on DBA's right to a jury trial." This is literally correct, since DBA raised no such contention in the Court of Appeals.

REASONS FOR DENYING THE WRIT

A. Neither of the issues presented in the petition was raised in the District Court or the Court of Appeals.

The petition for certiorari is the first time that DBA has said anything about the Seventh Amendment. DBA states (Petition at 6) that "[o]n appeal, DBA argued that the district court's instructions, among other things, violated DBA's rights under the Seventh Amendment and under the Due Process Clause of the Fourteenth Amendment." This is simply untrue. DBA claims that "[t]he Court of Appeals failed to address the Seventh Amendment issue." There was no Seventh Amendment issue to address. The due process contention originated in DBA's petition for rehearing in the Court of Appeals. At no time before the petition for rehearing did DBA argue that South Carolina's rule requiring the jury to assess punitive damages in *some* amount violates the Due Process Clause.

The same is true of DBA's Question II. At no time has DBA argued that due process is denied by a jury instruction that violation of an applicable statute creating a standard of conduct is negligence *per se* and is evidence of willfulness.

B. The Seventh Amendment is not implicated where the District Court applies the substantive law of the forum state to determine whether punitive damages in *some* amount must be assessed against a wrongdoer.

South Carolina is among the minority of jurisdictions where a willful, wanton, and reckless violation of plaintiff's rights *requires* the award of punitive damages in *some* amount. *Sample v. Gulf Oil Refinery,* 183 S.C. 399, 191 S.E. 209 (1937). *See* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform,* 39 VILL. L. REV. 363, 388 n.92 (1994). The amount is for the jury to determine under a proper charge. Plaintiff's entitlement to punitive damages in *some* amount if a willful violation is shown reflects the dual function of punitive damages in South Carolina as not only punishment and deterrence but as a vindication of the plaintiff's private right. *See, e.g., Rogers v. Florence Printing Co.,* 233 S.C. 567, 106 S.E.2d 258, 261 (1958); *Beaudrot v. Southern Ry.,* 69 S.C. 160, 48 S.E. 106, 107 (1904), and cases cited; *Davenport v. Woodside Cotton Mills Co.,* 225 S.C. 52, 80 S.E.2d 740, 743-44 (1954). *Cf. Mock v. Atlantic Coast Line R.R.,* 227 S.C. 245, 267, 87 S.E.2d 830, 840 (1955). *See generally* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform,* 39 VILL. L. REV. 363, 378-79 (1994); David G. Owen, *Punitive Damages in Products Liability Litigation,* 39 MICH. L. REV. 1257, 1295 (1994).

Plaintiff's entitlement to punitive damages in *some* amount — even if nominal — upon proof of a willful violation of her rights could not be affected by the removal of this action to district court. *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938). The Seventh Amendment guarantees DBA the jury trial which it received on the issue of whether its violation of plaintiff's rights was willful,

wanton, and reckless, and on the appropriate amount of punitive damages assessable for the violation.

C. The settled principle that violation of a statute creating a rule of conduct is negligence *per se* and is evidence of willfulness does not implicate the Due Process Clause.

The district court charged Section 48-1-90 of South Carolina's Pollution Control Act. This statute does not prohibit "the discharge of any substance" as DBA says, but rather prohibits the discharge of industrial wastes, etc., "except as in compliance with a permit issued by [DHEC]."

DBA mischaracterizes the charge. Nowhere in the charge did the district court instruct the jury that "a violation of law is willful and deliberate conduct *** " as DBA claims. The court instructed the jury:

> Now, the violation of a statute does not in and of itself prove recklessness, willfulness, or wantonness in and of itself, but is evidence that the jury may consider in arriving at its conclusion whether the defendant acted recklessly, willfully, and wantonly. And once again, the evidence must establish that the defendant's act of recklessness, willfulness, wantonness proximately caused the plaintiff's injury or damage.

This is an accurate statement of South Carolina law, and is the law nearly everywhere. Causative violation of a statute is evidence of willfulness, but it is always for the jury to decide whether a party was willful, as the court explained to the jury. *See, e.g., Wise v. Broadway,* 315 S.C. 273, 433 S.E.2d 857 (1993), where the court stated:

> The causative violation of a statute constitutes negligence *per se* and is evidence of recklessness and

> willfulness, requiring the submission of the issue of punitive damages to the jury. [Citations omitted.] Violation of a statute does not constitute recklessness, willfulness, and wantonness *per se*, but is some evidence that the defendant acted recklessly, willfully, and wantonly. [Citation omitted.] It is always for the jury to determine whether a party has been reckless, willful, and wanton. [Citation omitted.] However, it is not obligatory as a matter of law for the jury to make such a finding in every case of a statutory violation. [Citation omitted.]

433 S.E.2d at 859. *Accord: Cartee v. Lesley*, 290 S.C. 333, 350 S.E.2d 388, 390 (1986); *Ravan v. Greenville County*, 315 S.C. 447, 434 S.E.2d 296, 303 (Ct. App. 1993); *Tant v. Dan River, Inc.*, 289 S.C. 325, 345 S.E.2d 495 (1986).

DBA's complaint seems to be that a violation of statute is not negligence *per se* and is evidence of willfulness absent other proof of a state of mind. The actor's state of mind plays no part in negligence law. The standard is the conduct of a reasonably prudent person. The nearly universal principle that violation of an applicable statute is negligence *per se* is rooted in the truism that ordinarily prudent people do not violate statutes which prescribe a standard of conduct. In South Carolina as in most States, violation of an applicable statutory standard of conduct is not only negligence *per se* but is evidence of willfulness. As the district court correctly instructed the jury, although statutory violations may be viewed as evidence of willfulness, it was for the jury upon all the evidence to determine whether DBA's conduct was willful.

Since DBA's 14-year history of intentional disregard of South Carolina's Pollution Control Act could not have been "innocent," there is no occasion here to determine whether the due process clause is implicated where a non-negligent, unintentional violation of a statutory standard of conduct accepted as evidence of willfulness.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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October 9, 1997.